**DUKE LAW GUIDELINES AND BEST PRACTICES ADDRESSING CHRONIC FAILURE TO DIVERSIFY LEADERSHIP POSITIONS IN THE PRACTICE OF LAW**

**(FIRST DRAFT PENDING REVISION)**

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**PART I**

**Documenting the Problem, Making the Case, and Stating the Law**

1. **The Problem**

Although the number of women students has just recently surpassed men in law school, men and women have been graduating with law degrees at about the same rate for at least the last thirty years, and both have been entering private firms at similar rates. With these statistics, it would seem that more women would be ending up in leadership roles. But this is not the case.

Instead, women are severely underrepresented in positions of legal leadership. A 2015 American Bar Association (ABA) and American Bar Foundation Study showed that just 24% of lead counsel in civil cases were women.[[1]](#footnote-1) Of those attorneys who self-identified as “trial lawyers,” just 27% were women. When researchers segmented the data by case type, they found the same thing—the vast majority of lead counsel were men, regardless of whether the case was about civil rights, intellectual property rights, labor, torts, or others. In criminal cases, the picture was much the same; only 33% of lead counsel and 21% of trial attorneys were women. “[T]here is no type of case in which women are more likely than men to be lead counsel,” the authors concluded.[[2]](#footnote-2)

Retired district court judge, Shira A. Scheindlin, surveyed 2,800 federal and state judges in New York about the roles women lawyers play in their courts; the results were striking.[[3]](#footnote-3) Women have not made nearly enough progress in the profession, with barely 20% serving as lead lawyers for private parties in New York’s federal and state courts at the trial and appellate levels.

1. **Lost Opportunities**

The lack of women in leadership roles is not only a problem for the half of the profession impacted directly. It also represents a missed opportunity for both the bench and the bar more broadly. Some commentators have argued that many of the stereotypically female attributes that have disadvantaged women in the profession (assuming they exist) should be viewed as advantages. These qualities include the common view that women are considered better listeners, more empathetic, and less apt to possess the over-active ego that may sometimes interfere with constructive problem solving and consensus building. [[4]](#footnote-4)

Women lawyers are also likelier to connect with female jurors.[[5]](#footnote-5) “[W]omen have a great advantage,” said litigator Elizabeth Cabraser in the ABA’s *Publishing Perspectives*, “because women have had to learn to listen—listening to judges is more important than talking to judges; listening to what the witnesses are saying is more important than saying what you’ve already decided you want to say. . . . Women have had to learn to do that.”[[6]](#footnote-6) A 2012 “Decision Quest” survey of hundreds of jurors found that 97% of respondents felt female attorneys were no less qualified than male attorneys, and some regarded women as more qualified because they could “invoke more emotion.”[[7]](#footnote-7)

In addition, female lawyers may even work harder than their male counterparts, according to a 2015 Harvard Law School Study.[[8]](#footnote-8) In a 2009–10 survey of graduates from the classes of 1975, 1985, 1995, and 2000, the report showed that in terms of hours worked, women outpaced men in all four classes, with those from the class of 2000 working nearly eight additional hours per week.

Data published by both ABA and NALP (National Association for Law Placement) confirm that the diversity pictures based on race, ethnicity, and sexual orientation among law school graduates continue to be discouraging.[[9]](#footnote-9) Moreover, as noted above, the divide grows as young graduates advance in seniority. The picture is particularly bleaker for diverse women lawyers. Although the NALP 2016 Report on Diversity in U.S. Law Firms found that 45% of associates are women, only 12.42% of associates were minority women.[[10]](#footnote-10) Of partners, only 8.05% were women and a mere 2.76% minority women.[[11]](#footnote-11) Moreover, African American women comprised just 2.32% of associates and 0.64% of partners.[[12]](#footnote-12)

Similarly, the NALP Directory of Legal Employers reported that in 2016, only 2.48% of lawyers identified as openly lesbian, gay, bisexual, or transgender.[[13]](#footnote-13) Perhaps not surprisingly, the highest numbers are at the largest law firms (those with 701-plus lawyers) and among associates (3.24% overall, compared to 1.89% for partners).[[14]](#footnote-14) There is also wide geographic variation, with most of the LGBT attorney presence clustered in New York City, Washington, D.C., Los Angeles, and San Francisco.[[15]](#footnote-15)

A 2016 ABA questionnaire reflected that of the 34,179 degrees awarded by ABA-approved law schools, less than a third (10,831) went to candidates representing racial or ethnic minorities.[[16]](#footnote-16) NALP has reported that in 2014, just over 600 law school graduates identified as lesbian, gay or bisexual and only 15 identified as transgender.[[17]](#footnote-17) Of these individuals, 43% were women.[[18]](#footnote-18)

1. **Few Women and Diverse Lawyers in Mass-Tort MDL and Class Action Leadership Positions**

By virtue of their size and import, mass tort and class action litigation typically require teams of plaintiffs’ lawyers to work cooperatively to effectively litigate a matter. In both types of cases, law firms from around the country pool resources to review millions of pages of documents, handle depositions, draft pleadings, hire experts, and, ultimately, try cases. Organizing all of those tasks, and many lawyers, requires effective leadership.

The necessity of these *Guidelines and Best Practices* is underscored by recent studies demonstrating the lack of female leadership in complex litigation. A 2016 study published by the American Bar Foundation and the ABA’s Commission of Women in the Profession, *First Chairs at Trial*,[[19]](#footnote-19) revealed that women are consistently underrepresented in lead counsel positions. In civil cases, men are three times more likely than women to appear as lead counsel and as trial attorneys. In the majority of civil cases (59%) analyzed, lead counsel were all men; 13% had all women as lead counsel. Lawyers appearing as lead counsel in class actions revealed the starkest results, with 87% being male, and only 13% being female. These numbers are particularly jarring given that roughly 32% of all lawyers appearing in civil cases in the district studied were women.[[20]](#footnote-20) Clearly, women are present in the courtroom in sizable numbers, but they are not finding opportunities to be lead counsel, and they are not getting recognized for the work they are doing on their cases.

Looking specifically at class action and MDL litigation, the study found that 71% of class actions did not have any women lead counsel. MDL data also reflect a significant gender divide. According to a study of MDLs pending as of April 15, 2014, men were appointed to lead counsel 11.8 times more often than women from 2000 to 2004, 6.73 times more often from 2005 to 2009, and 3.02 times more often from 2010 to 2014. Although the gap is slowly narrowing, there remains a good way to go. Men continue to secure 5.47 times more executive committee appointments than do women. In fact, the Bureau of National Affairs reported in February 2017 that between 2011 and 2015, women made up just 16.55% of all plaintiffs’ MDL leadership appointments.[[21]](#footnote-21)

So why aren’t women attaining class action and MDL leadership positions and what is there to do about it? Is there a way to get past the current chicken-and-egg conundrum? Women may be perceived as unqualified for leadership roles, and because of this perception, women do not receive leadership roles. They are blocked from developing the qualifications deemed prerequisites for lead counsel service.[[22]](#footnote-22)

1. **Barriers to Appointment**

In December 2016, the ABA reported that, for the first time, there were more women students than men in law school.[[23]](#footnote-23) Yet in courtrooms, unlike in law schools, not much has changed. Judge Scheindlin noted that after 22 years on the bench, she still witnessed women as “usually junior and silent” when it came to arguing cases.[[24]](#footnote-24) Other judges have observed the same thing, as recorded in the New York State Bar Association report *If Not Now, When?*[[25]](#footnote-25)

Previously there was a common misconception that the gender gap would work itself out — that as more women entered the profession and rose through the ranks, they would eventually achieve parity with their male counterparts. To date, unfortunately, this has not happened.

In the last few years, the gender gap has garnered renewed attention as a problem that will not be solved by simply waiting. It requires greater education, awareness, and action. Both law firms and their clients are increasingly focused on the development and retention of female talent. But the conversation has expanded beyond individual firm practices, casting light on women’s industry-wide underrepresentation — for example, the absence of women from MDL and class action leadership positions. A recent study found that men are five times more likely than women to be appointed to a leadership position in a MDL.[[26]](#footnote-26)

This section identifies and describes some, but not all, of the professional barriers that prevent women from rising to more powerful positions in MDL and class action litigation. These barriers include subtle forms of bias and discrimination as well as systemic roadblocks encountered by women both within their own firms and when vying for opportunities among broader groups of lawyers. On both fronts, what appears to be a system promoting meritocracy may not be. Jurists and lawyers alike should identify and ameliorate these barriers in both the creation and management of MDL and class action leadership teams so that talent can rise.

1. **Second-Generation Discrimination**

Second-generation gender biases contribute to “work cultures and practices that appear neutral and natural on their face” yet reflect masculine values and life situations of men who have been dominant in the development of traditional work settings.[[27]](#footnote-27)  The legal profession may be past the days when quotas or other overtly expressed biases kept a woman from getting her foot in the door, but instead we find leadership opportunities limited or foreclosed by more subtle obstacles.

One example of second-generation discrimination is implicit bias, or an unintentional cognitive bias against minorities.[[28]](#footnote-28) Although not overt or obvious, implicit bias is a fundamental and insidious form of discrimination.[[29]](#footnote-29) It stems from the idea of homophily: that individuals bond most easily with those who are like them.[[30]](#footnote-30)

Studies of work environments show that people favor coworkers of the same sex, gender, race, and ethnicity by giving those coworkers favorable evaluations, mentoring, loyalty, cooperation, rewards, and opportunities.[[31]](#footnote-31) Implicit bias can be exacerbated by the desire of leadership to maximize cooperation and build consensus. In the MDL context, internal discord may be one of the greatest concerns of a leadership committee tasked with “herding the cats” among their own ranks. As a result, people may pick team members who they think will get along with each other and not attempt to undermine the ultimate decision making authority of the most senior leaders. Their instinct about who those people are will often lead them to pick candidates who look, sound, and act like them. Consciously or not, embedded assumptions that diverse teams are more prone to conflict and less prone to consensus may unfairly hurt women in the MDL selection process.[[32]](#footnote-32)

Confirmation bias, a concept related to implicit bias, may also affect how younger candidates are assessed when their colleagues consider their readiness for leadership. Partners and clients are more likely to recall information that confirms their biases about the younger lawyers on their teams and include that information in evaluations.[[33]](#footnote-33) For example, attorneys who assume that working mothers are less committed to their careers tend to remember the times the mothers left early, not the nights they stayed late.[[34]](#footnote-34)

Even when women are given positive evaluations, those evaluations are often unwittingly shaded by gender stereotypes. For example, the female employee may be praised as supportive and encouraging (characteristics that conform to a set of perceived female strengths) rather than as a tough negotiator.[[35]](#footnote-35) Needless to say, if what is remembered and praised about young lawyers does not align with the most valued leadership skills, women are going to be set up for failure in the selection process from the start.

Conversely, studies show that for both men and women, speaking or acting in ways that violate socially acceptable gender norms and highlight attributes (including strengths) that are viewed as not typical of their gender tends to lead to a loss of status in a professional dynamic.[[36]](#footnote-36) This means that valued behavior by a white man may be criticized in someone else. It also means that women and other diverse candidates who do make it onto leadership groups are still marginalized by being put into lesser roles, which fit social and cultural conventions of what they do and do not do best.

1. **Legal Industry’s Fallacy of Meritocratic Evaluations**

Meritocratic performance evaluations are inherently subjective. The “meritocratic” aspects of these reviews are therefore often a fallacy as applied to women attorneys experiencing second-generation discrimination. Research has found that men’s performance reviews were twice as likely as women’s to contain references to their technical expertise and “vision.”[[37]](#footnote-37) Moreover, in a sample of 248 performance reviews from 28 nonlegal companies, the reviews given to women were far likelier than reviews given to men to contain critical feedback; 71% of women’s reviews contained negative feedback, compared to 2% of men’s reviews.[[38]](#footnote-38) This effect is particularly pronounced when an employee’s leadership is evaluated. Although good leaders are expected to be strong, confident, and assertive, women exhibiting these qualities are often seen negatively, perhaps as uncaring, self-promoting, and aggressive.[[39]](#footnote-39)

In the legal industry, which men have historically dominated, implicit bias undermines meritocratic performance evaluations. A male evaluator — probable in an industry where the vast majority of senior attorneys are men[[40]](#footnote-40) — may be prone to assume that the employee being reviewed is more capable, successful, and worthy of a positive evaluation if the employee is another man. The evaluator is unaware that he is favoring male employees over female employees, and the discrimination is unintentional; but, in aggregate, this implicit bias results in more favorable evaluations for men than for women, thereby reinforcing the bias.

As a result, one researcher has found that gender-based implicit bias results in women failing to receive the presumption of competence that is given to white men.[[41]](#footnote-41) Moreover, many studies indicate that women are held to a higher performance standard than their colleagues and are given lower evaluations for similar work.[[42]](#footnote-42) Even a signal of gender may impair judgment: in 1996, the *Virginia Law Review* changed the requirements for its applications from handwritten papers to typewritten. Until that year, women had consistently comprised about 30% of the *Law Review*’s membership.The year handwritten submissions were abolished, women membership jumped to 50% — presumably because the female applicants’ neat handwriting did not disclose their likely gender.

Moreover, while managers evaluate employees on technical or presumably objective metrics, when it comes time to put the whole picture together, their use of objective data is different for men than women. Particularly, when someone is neither a star nor plainly unqualified (which is true for most younger or upcoming lawyers seeking a first shot on a leadership team), the decision whether to hire or promote will be based much more on “feel” than on technical skill. The decisionmaker tends to minimize the objective metrics (unless it suits them to do otherwise), such as performance on a test, and focuses instead on intangibles. And because people “feel” worse about those different from themselves, this means that, unless diverse candidates have advocates to push them into leadership roles, they are less likely to make it through a leadership selection process.[[43]](#footnote-43)

1. **Intersectionality of Race, Sexual Orientation, and Gender Further Complicates Discrimination**

There is virtually no objective data reflecting the disparity in MDL and class action leadership opportunities by race, ethnicity, sexual orientation, or other metrics for measuring diversity.[[44]](#footnote-44) Still, the existence of a problem is indisputable. As disappointing as the picture looks for straight white women, the representation of women who are diverse in other respects is far more limited.[[45]](#footnote-45)

1. **Private Ordering Favors Repeat Players and Creates a Bottleneck of Senior Lawyers Filling Leadership Slots**

The leadership appointment system in MDL actions has worked — and largely continues to work — to limit opportunities for diverse lawyers. Put most simply, because the current appointment system favors seniority, and because senior lawyers are often white men, the system favors homogenous leadership teams.

The *Manual* suggests factors judges may use in selecting MDL leaders. Not surprisingly, two of the most important and most frequently cited criteria are (1) “knowledge and experience” in the type of litigation and (2) access to sufficient resources.[[46]](#footnote-46) Being able to say, “I’ve done this many times before” and “I can put a lot of money into this” counts for a lot, but only those who have seniority and an established track record (which mostly means only white men) can credibly make that claim.[[47]](#footnote-47)

While judges’ methods of appointment vary, traditionally judges have appointed class action and MDL leadership through “private ordering” — also known as the “consensus model” — a process in which judges request that each side come to an agreement on leadership amongst themselves and present a unified slate for approval by the court, which typically adopts the presented slate wholesale. Getting on this slate, of course, requires name recognition, a degree of both financial and political clout, and a personal network of internal advocates.

Many researchers have observed that private ordering has created a “boys’ club,” or a very small group of MDL and class action “repeat players,” mostly senior male attorneys, who are appointed to key leadership positions again and again and leave no opportunities for new female attorneys.[[48]](#footnote-48) Repeat players shape leadership appointments in several ways: (1) the consensus or “self-ordering” selection method allows repeat players to proffer a preordained leadership slate; (2) even if a judge employs a competitive selection process, chosen leaders (often repeat players because they tend to have the most experience) are typically empowered to select attorneys to perform work or serve on subcommittees; and (3) even in open-selection appointment methods, repeat players can endorse and vouch for one-another’s abilities.[[49]](#footnote-49)

Although the presence of some repeat players in MDL and class actions can be a boon in certain respects (for example, they can capitalize on acquired knowledge and often bring significant economic resources to litigation), repeat players should seek to promote qualified newcomers and judges should strive for more diverse appointments. This entrenched status quo stifles the development of qualified, capable female and other diverse attorneys, who will be robbed of a chance to shine absent a shake-up of the repeat player network.[[50]](#footnote-50) Holding back qualified, diverse attorneys from advancement provides a disservice to represented parties; homogeneous groups have been shown to be less innovative than heterogeneous mixes of attorneys.[[51]](#footnote-51) Moreover, judges may grow tired of the script provided by the repeat players from past lawsuits. Inviting to the table leaders who can think beyond the box of past MDLs, potentially finding new, creative solutions to recurring problems, might also strengthen the relationship between the bench and the bar.

1. **Making the Case -- Diversified Leadership Enhances Administration of Justice**

Increasing diversity in mass tort and class action leadership so that it better reflects the demographics of represented groups serves the purposes of enhancing the quality and perceived legitimacy of the administration of justice. At a time when fairness in the courthouse is questioned and judges find themselves increasingly under attack,[[52]](#footnote-52) the integrity of the civil justice system is strengthened by inclusion. Participants in the civil justice system –– plaintiffs, defendants, witnesses, absent class members, and jurors alike –– take comfort in knowing that the system serves all.[[53]](#footnote-53) Including diverse members in all of these participant cohorts would suggest that the system is not rigged.

Studies show the value of diversity in improved decisionmaking.[[54]](#footnote-54) An inclusive approach to leadership appointments helps avoid the “group think” that creeps into insular teams. Creativity increases with the introduction of outsiders.[[55]](#footnote-55) These *Guidelines and Best Practices* neither promote quotas nor condone box-ticking: the gender or ethnic background of a person should not be wholly determinative of one’s value to a leadership team. It is important to understand diversity broadly, accounting for differences across experiences, values, education, and so forth. This diversity positively affects outcomes and should be sought after as well.[[56]](#footnote-56)

In developing diverse teams that are also productive, “critical mass” is important. A single woman lawyer (or a single lawyer of color) can easily be marginalized. The “rule of three” posits that until there are at least three members of the nondominant group present, the governing body (whether it be a corporate board, a committee, or otherwise) will not change. This is because when there is only a single member of the non-dominant group present, she typically will not speak up or, when she does, will be ignored. In contrast, when three or more women or multicultural professionals are in a room, they feel more empowered to speak up and engage in the conversation. They are also less likely to be sidelined.

Fortunately, overt hostility towards women and diverse attorneys is on the wane. It is no longer acceptable to categorically exclude women and minorities from leadership positions. Implicit bias (also referred to as “second-generation discrimination”), however, persists in all of us, and it is likely to blame for some of the reluctance to place women and diverse attorneys to positions of power in complex litigation.[[57]](#footnote-57) Second-generation discrimination should be understood and resisted by the judiciary.[[58]](#footnote-58)

Recognizing the need for increased inclusion in judicial appointments, in 2016, the National Association of Women Judges (NAWJ), under the leadership of NAWJ President Hon. Lisa Walsh, adopted a “Resolution on Diversity in Trial Court Appointments.” The Resolution acknowledges that trial courts have not appointed women lawyers, diverse lawyers and lawyers in small firms in numbers commensurate with their representation in the legal profession generally and urges that trial courts, both federal and state, “should be mindful of the importance of diversity and should make appointments that are consistent with the diversity of our society and the justice system.” The same Resolution has been adopted by the American Association for Justice, the Defense Research Institute, the Federation of Defense and Corporate Counsel, the Association of Defense Trial Attorneys, the Hispanic National Bar Association, and the Conference of Chief Justices.[[59]](#footnote-59)

1. **Stating the Law -- Applicable Standards Governing Leadership Appointments**
2. **Complex-Litigation Structures**

To determine how best to increase diversity in the leadership of mass torts and class actions, it is important to understand some significant differences between class actions and mass torts. First, and most fundamentally, in a class action, one or more plaintiff representatives is appointed by the court to represent the entirety of interests of absent class members. Absent class members’ claims thus rise or fall together with those of the class representatives.[[60]](#footnote-60) In a mass tort, in contrast, while some aspects of the claim may be litigated on behalf of a group of plaintiffs, each plaintiff must ultimately prove his or her claim and each plaintiff has retained an attorney for representation. As a result, it is possible – and usually desirable – to appoint a much smaller number of lawyers to lead a class action than a mass tort, in which there may be hundreds or thousands of individual claims.

1. **Mass Tort MDL**

A mass tort litigation “emerges when an event or series of related events injure a large number of people or damage their property.”[[61]](#footnote-61) Related tort cases can be aggregated in a single federal judicial district pursuant to 28 U.S.C. § 1407(a), in a single state court pursuant to state coordination rules and statutes, or coordinated across state and federal courts (usually informally). In all of these situations, courts typically appoint lead counsel to coordinate discovery and other pretrial preparation.

Unless the action qualifies for class action treatment, there is no federal rule requiring the appointment of lead counsel or a committee of counsel to manage mass tort litigation. There are several reference sources, however, the most important of which is the *Manual*, which recommends such appointment. The *Manual* states:

Where several counsel are competing to be lead counsel or to serve on a key liaison committee, the court should establish a procedure for attorneys to present their qualifications, including their experience in managing complex litigation and knowledge of the subject matter, their efforts in researching and investigating the claims before the court, and the resources that they can contribute to the litigation. Often counsel will agree among themselves as to who should serve as lead counsel or assume responsible positions on counsel committees; but the judge must be satisfied that counsel can perform the assigned roles and that they have not entered into improper arrangements to secure such positions. Including plaintiffs’ attorneys with different perspectives and experience in lead or liaison counsel or as committee members can be helpful. Consider also including counsel handling significant numbers of state cases to facilitate coordination among state and federal cases. Section 20.31 discusses steps that judges can take in organizing counsel to help coordinate cases among state and federal courts, emphasizing the need to include attorneys involved in cases needing coordinated efforts.[[62]](#footnote-62)

1. **Class Actions**

In contrast to mass torts, in class actions a court must appoint class counsel when it certifies a class, unless a statute provides otherwise.[[63]](#footnote-63) While Rule 23(g) by its terms applies at the class certification stage of the litigation, federal courts almost invariably appoint lead counsel – referred to as “interim lead counsel” – much earlier, usually before the consolidated complaint is filed.[[64]](#footnote-64) Particularly in the wake of recent decisions requiring plaintiffs to present much more evidence at the class certification stage, this early appointment makes eminent sense, as the class motion is filed late in the case after the consolidated amended complaint is filed, after motions to dismiss are decided, and usually after most discovery is completed.

Rule 23(g) sets out the criteria for appointing lead counsel. A court “***must*** consider:

(A)(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class.”

In addition, the court “*may* consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class.”[[65]](#footnote-65)

Finally, class counsel must “fairly and adequately” represent the interests of the class. [[66]](#footnote-66)

When more than one counsel seeks appointment, and is adequate under Rule 23(g)(1) and (4), the court “must appoint the applicant best able to represent the interests of the class.”[[67]](#footnote-67)

1. **Guidance**
   * + 1. ***Manual for Complex Litigation***

The *Manual* recognizes the essential role that counsel play in the success of any complex litigation. The role of counsel is so essential, in fact, that the *Manual* places it up front in its overview of “General Principles.”[[68]](#footnote-68) What is emphasized at the outset, moreover, is not the number of past appointments that one has under his or her belt; it is the skills required to work effectively with the court and other attorneys. The *Manual* explains that the “added demands and burdens of complex litigation place a premium on attorney professionalism, and the judge should encourage counsel to act responsibly.”[[69]](#footnote-69) Among the traits highlighted by the *Manual* include attorneys’ ability “to fulfill their obligations as advocates in a manner that will foster and sustain good working relations among fellow counsel and with the court.”[[70]](#footnote-70) Indeed, counsel “need to communicate constructively and civilly with one another and attempt to resolve disputes informally as often as possible.”[[71]](#footnote-71) And as the *Manual* emphasizes, “[e]ven where the stakes are high, counsel should avoid unnecessary contentiousness and limit the controversy to material issues genuinely in dispute.”[[72]](#footnote-72)

Further, the *Manual* urges courts not to rubber stamp a leadership slate proposed by a majority of attorneys in the case, but to take an active part in deciding which individual attorneys are appropriate for which particular roles, be liaison counsel, lead counsel, or a committee member. And in appointing counsel, the *Manual* advises that “[i]t is important to assess the following factors”:

* “qualifications, functions, organization, and compensation of designated counsel”;
* “whether there has been full disclosure of all agreements and undertakings among counsel”;
* “would-be designated attorneys’ competence for assignments”;
* “whether there are clear and satisfactory guidelines for compensation and reimbursement, and whether the arrangements for coordination among counsel are fair, reasonable, and efficient”;
* “whether designated counsel *fairly represent the various interests in the litigation –– where diverse interests exist*among the parties, the court may designate a committee of counsel representing different interests”;
* “the attorneys’ resources, commitment, and qualifications to accomplish the assigned tasks”; and
* “the attorneys’ ability to command the respect of their colleagues and work cooperatively with opposing counsel and the court – experience in similar roles in other litigation may be useful, but an attorney may have generated personal antagonisms during prior proceedings that will undermine his or her effectiveness in the present case.”[[73]](#footnote-73)

As is obvious from the above bullet points, “experience in similar roles in other litigation” is only *one* of myriad considerations. And with respect to past experience, the court should probe further to try to discern between ‘good’ and ‘bad’ experience. That is, an attorney with a reputation for ruthlessness who creates needless disputes with other counsel may, despite a laundry-list of past appointments, be passed over for another attorney who has less experience but who has not engendered animosity among the same peers she is tasked with leading. In other words, courts should look beyond what looks good on paper and determine which attorneys will provide the type of collegial and steady leadership that is needed in a given case.

In addition, the *Manual* acknowledges that diverse interests should be considered. This does not appear on its face to be a call to action for appointing more women and minority attorneys, but it could be used to support such an argument, particularly in cases that implicate the rights or experiences of women and minorities.

In a later chapter devoted to class actions, the *Manual* provides additional guidance for appointing class counsel.[[74]](#footnote-74) After reciting the Rule 23(g) factors, the *Manual* adds that such factors as involvement in parallel litigation, an attorney-client relationship with a named party, and fee and expense arrangements may also be relevant considerations.[[75]](#footnote-75) The *Manual* goes on to outline various approaches to appointment of class counsel, including “private ordering”, a selective application process, and competitive bidding in certain circumstances.[[76]](#footnote-76) In recommending best practices, we should advocate an approach that requires the active involvement of the court in vetting each attorney appointed to serve as class counsel, rather than passively accepting “privately-ordered” slates of repeat players.

* + - 1. ***Duke MDL Standards and Best Practices***

In 2013, Duke Law School’s Center for Judicial Studies (now the Bolch Judicial Institute) held a conference on MDL actions. The purpose of the conference was to identify consensus positions that could be developed into standards and best practices for the efficient and effective litigation of MDL actions. As a result of that conference and following the input of numerous federal and state judges and prominent defense and plaintiff practitioners, the Center published *Standards and Best Practices for Large and Mass-Tort MDLs (Standards and Best Practices*).[[77]](#footnote-77)

Chapter 2 of *Standards and Best Practices* is devoted to the selection and appointment of leadership in MDLs, with three Standards[[78]](#footnote-78) and numerous proposed Best Practices. It includes several recommendations that potentially impact the likelihood that women and diverse applicants will be appointed to leadership positions. It recommends, for example, that the transferee judge order eschew private ordering in favor of a competitive process requiring individual applications. This can reduce the so-called repeat-player dynamic, which is an obstacle to women and minorities (see above). It also urges judges to “be mindful of the benefits of diversity of all types.”[[79]](#footnote-79)

Of particular interest to advancing the cause of increasing the number of women and diverse leadership appointments, *Best Practice* 4E recommends: “The transferee judge should take into account whether the leadership team adequately reflects the diversity of legal talent available and the requirements of the case.”[[80]](#footnote-80) In order to expand this Best Practice to reach class actions in addition to mass tort MDLs,[[81]](#footnote-81) a new Best Practice 8I is set out in a later section.

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2. *Id.* [↑](#footnote-ref-2)
3. N.Y. State Bar Ass’n, Task Force on Women’s Initiative, If Not Now, When? Achieving Equality for Women Attorneys in the Courtroom and in ADR 14 (2017), www.nysba.org/WomensTaskForceReport [hereinafter NYSBA Report]. [↑](#footnote-ref-3)
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7. Victoria Pynchon, *Juror Attitudes to Women in the Courtroom*, Forbes (Feb. 15, 2012, 11:11 AM), www.forbes.com/sites/shenegotiates/2012/02/15/juror-attitudes-to-women-in-the-courtroom/. [↑](#footnote-ref-7)
8. David B. Wilkins, Bryon Fong, & Ronit Dinovitzer, Harv. L. Sch. Ctr. Legal Prof., The Women and Men of Harvard Law School: Preliminary Results from the HLS Career Study 37–38 (2015). [↑](#footnote-ref-8)
9. Enrollment and Degrees Awarded: 1963 – 2012 Academic Years, https://www.americanbar.org/content/dam/aba/administrative/legal\_education\_and\_admissions\_to\_the\_bar/statistics/enrollment\_degrees\_awarded.pdf (last visited Mar. 18, 2018) [hereinafter Enrollment and Degrees Awarded]; NALP 2016 Diversity, *supra* note 10. [↑](#footnote-ref-9)
10. Nat’l Ass’n for Law Placement, Inc., 2016 Report on Diversity in U.S. Law Firms tbl.1 (2017) [hereinafter NALP 2016 Diversity]. “Minority women” are defined in this section as women whose race or ethnicity is black, Hispanic, American Indian/Alaskan Native, Asian, Native Hawaiian or other Pacific Islander, and those of multi-racial heritage. [↑](#footnote-ref-10)
11. *Id.* [↑](#footnote-ref-11)
12. *Id.* at tbl.2. [↑](#footnote-ref-12)
13. LGBT Representation Among Lawyers in 2016, http://www.nalp.org/0117research (last visited Mar. 18, 2018). [↑](#footnote-ref-13)
14. *Id.* [↑](#footnote-ref-14)
15. *Id.* [↑](#footnote-ref-15)
16. Enrollment and Degrees Awarded, *supra* note 9. [↑](#footnote-ref-16)
17. New Research on Employment Outcomes for Lesbian, Gay, and Bisexual Graduates, www.nalp.org/1115research (last visited Mar. 18, 2018). One interesting finding that may also impact MDL leadership opportunities is that LGBT lawyers are much more likely to take public interest jobs –– about 16 percent of this group compared to 7 percent of graduates overall. [↑](#footnote-ref-17)
18. *Id.* [↑](#footnote-ref-18)
19. Scharf & Liebenberg, *supra* note 1. [↑](#footnote-ref-19)
20. *A Current Glance at Women in the Law*, published in January 2017 by the American Bar Association’s Commission on Women in the Profession, explains that women comprise 36% of all lawyers and 33% of federal district court judges. Am. Bar Ass’n, A Current Glance at Women in the Law 2, 5 (2017). [↑](#footnote-ref-20)
21. Julie A. Steinberg, *More Women Plaintiffs’ Lawyers Becoming Complex Litigation Leaders*, Bloomberg (Feb. 3, 2017), www.bna.com/women-plaintiffs-lawyers-n57982083338/. [↑](#footnote-ref-21)
22. *See, e.g.*, *id.* (citing Roberta Liebenberg, co-lead counsel in an antitrust suit). [↑](#footnote-ref-22)
23. *ABA Required Disclosures for 2016,* *J.D. Enrollment and Ethnicity (academic year)*, Am. Bar Ass’n, http://www.abarequireddisclosures.org/ (last visited Mar. 26, 2018); *see also* Elizabeth Olson, *Women Make Up Majority of U.S. Law Students for First Time*, N.Y. Times, Dec. 16, 2016, at B4, *available at* www.nytimes.com/2016/12/16/business/dealbook/women-majority-of-us-law-students-first-time.html. Data from the American Bar Association (ABA) put the number of women studying for a juris doctor degree at 55,766 nationally, compared with 55,059 men. Women comprised 50 percent of first-year students. *See* ABA Required Disclosures for 2016, *supra* note 53. [↑](#footnote-ref-23)
24. Hon. Shira A. Scheindlin, *Female Lawyers Can Talk, Too*, N.Y. Times (Aug. 8, 2017), www.nytimes.com/2017/08/08/opinion/female-lawyers-women-judges.html. [↑](#footnote-ref-24)
25. NYSBA Report, *supra* note 3. [↑](#footnote-ref-25)
26. *See generally* Fegan, *supra* note **Error! Bookmark not defined.**. [↑](#footnote-ref-26)
27. Spela Trefault et al., *Closing the Women's Leadership Gap: Who Can Help?*, CGO Insights (Apr. 2011), www.simmons.edu/~/media/Simmons/About/CGO/Documents/INsights/Insights-32.ashx?la=en. [↑](#footnote-ref-27)
28. Anne Jaffee et al., Retaining and Advancing Women in National Law Firms 11 (Stan. L. Sch. 2016), https://www-cdn.law.stanford.edu/wp-content/uploads/2016/05/Women-in-Law-White-Paper-FINAL-May-31-2016.pdf. [↑](#footnote-ref-28)
29. Although implicit bias is hidden, its existence is provable. Harvard University created Project Implicit, a non-profit organization and international network of researchers investigating implicit social cognition, or “thoughts and feelings outside of conscious awareness and control.” Project Implicit, www.projectimplicit.net/index.html (last visited Sept. 5, 2017). The goal of Project Implicit is “to educate the public about hidden biases and to provide a ‘virtual laboratory’ for collecting data on the Internet.” *Id.* One part of this education is the project’s online Implicit Association Test, which measures the embedded attitudes and beliefs that people are either unwilling or unable to report. *Id.* [↑](#footnote-ref-29)
30. Jaffee et al., *supra* note 28, at 6 n.15. [↑](#footnote-ref-30)
31. *Id.* [↑](#footnote-ref-31)
32. *See* Lisa Burrell, *We Just Can’t Handle Diversity*, Harv. Bus. Rev. (2016), https://hbr.org/2016/07/we-just-cant-handle-diversity. [↑](#footnote-ref-32)
33. Jaffee et al., *supra* note 28, at 20. [↑](#footnote-ref-33)
34. *Id.* [↑](#footnote-ref-34)
35. Sherrie Bourg Carter, High Octane Women: How Superachievers Can Avoid Burnout 43 (2011). [↑](#footnote-ref-35)
36. Victoria L. Brescoll, Opinion, *What Do Leaders Need to Understand About Diversity?* Yale Insights (Jan. 1, 2011), http://insights.som.yale.edu/insights/what-do-leaders-need-to-understand-about-diversity. [↑](#footnote-ref-36)
37. Jaffee et al., *supra* note 28, at 28. [↑](#footnote-ref-37)
38. *Id.* [↑](#footnote-ref-38)
39. Sherrie Bourg Carter, *The Invisible Barrier: Second Generation Gender Discrimination*, Psych. Today (May 1, 2011), www.psychologytoday.com/blog/high-octane-women/201105/the-invisible-barrier-second-generation-gender-discrimination. [↑](#footnote-ref-39)
40. *A Current Glance at Women in the Law*, Am. Bar Ass’n (Jan. 2017), www.americanbar.org/content/dam/aba/marketing/women/current\_glance\_statistics\_january2017.authcheckdam.pdf. [↑](#footnote-ref-40)
41. Jaffee et al., *supra* note 28 [↑](#footnote-ref-41)
42. *Id.* [↑](#footnote-ref-42)
43. *See* Burrell, *supra* note 62; Candice Morgan, *What We Learned from Improving Diversity Rates at Pinterest*, Harv. Bus. Rev. (July 11, 2017), https://hbr.org/2017/07/what-we-learned-from-improving-diversity-rates-at-pinterest. [↑](#footnote-ref-43)
44. Scharf & Liebenberg, *supra* note 1, at 10. [↑](#footnote-ref-44)
45. *Id.* at 16. [↑](#footnote-ref-45)
46. Manual (Fourth), *supra* note [34], § 10.22. [↑](#footnote-ref-46)
47. Nationwide, only 17 percent of equity partners are women. Deborah Chang & Sonia Chopra, *Where Are All the Women Lawyers? Diversity in the Legal Profession in California: 2015*, Forum 18, 19 (2015), http://www.njp.com/wp-content/uploads/article/article36.pdf. Not only do those women earn less than their male counterparts, but as non-equity partners, they often lack the clout to steer significant money and time to a MDL. *See id.* [↑](#footnote-ref-47)
48. *See generally* Burch & Williams, *Repeat Players In Multidistrict Litigation*, *supra* note **Error! Bookmark not defined.**; Burch, *Monopolies in Multidistrict Litigation*, *supra* note **Error! Bookmark not defined.**; Burch, *Judging Multidistrict Litigation*, *supra* note 81; Bronstad, *supra* note **Error! Bookmark not defined.**; Hobbs, *supra* note **Error! Bookmark not defined.**. [↑](#footnote-ref-48)
49. Burch & Williams, *Repeat Players In Multidistrict Litigation*, *supra* note **Error! Bookmark not defined.**. [↑](#footnote-ref-49)
50. Dana Alvaré, Vying for the Lead in the “Boys’ Club”: Understanding the Gender Gap in Multidistrict Leadership Appointments 4 (Temple Univ. Beasley School of Law 2017), www2.law.temple.edu/csj/cms/wp-content/uploads/2017/03/Vying-for-Lead-in-the-Boys-Club.pdf; Aebra Coe, *Female Lawyers Are Still Struggling to Land Lead MDL Roles*, Law360 (Mar. 16, 2017), www.law360.com/articles/899783/female-lawyers-are-still-struggling-to-land-lead-mdl-roles. [↑](#footnote-ref-50)
51. Burch, *Judging Multidistrict Litigation*, *supra* note 81, at 86, 120 (“Outsiders aren’t smarter—they’re just novel and different. They add value by offering a fresh perspective, challenging the status quo, and injecting new information into the discussion.”). [↑](#footnote-ref-51)
52. S*ee, e.g.*, Pound Civ. Just. Inst., The War on the Judiciary, Can Independent Judging Survive? (2013) (discussing attacks on the judiciary). [↑](#footnote-ref-52)
53. *See* Melissa Mortazavi, *Blind Spot: The Inadequacy of Neutral Partisanship*, 63 UCLA L. Rev. Disc. 16 (2015); see *also*Hon.Anna Blackburne-Rigsby, *Ensuring Access To Justice For All:* *Addressing the “Justice Gap” Through Renewed Emphasis on Attorney Professionalism and Ethical Obligations in the Classroom and Beyond*, 27 Geo. J. Legal Ethics 1187 (2014). [↑](#footnote-ref-53)
54. *See* Katherine W. Phillips, *How Diversity Makes Us Smarter*, Sci. Am. (Oct. 1, 2014), https://www.scientificamerican.com/article/how-diversity-makes-us-smarter/. [↑](#footnote-ref-54)
55. Some researchers go so far as to posit that women are better decision makers. *See* Therese Huston, *Are Women Better Decision Makers?*, N.Y. Times (Oct. 17, 2014), https://www.nytimes.com/2014/10/19/opinion/sunday/are-women-better-decision-makers.html. Others suggest they make better leaders. *See* Jack Zenger & Joseph Folkman, *Are Women Better Leaders Than Men?*, Harv. Bus. Rev. (Mar. 15, 2012), https://hbr.org/2012/03/a-study-in-leadership-women-do; Rochelle Sharpe, *As Leaders, Women Rule: New Studies Find That Female Managers Outshine Their Male Counterparts in Almost Every Measure*, Bloomberg (Nov. 20, 2000, 12:00 AM), https://www.bloomberg.com/news/articles/2000-11-19/as-leaders-women-rule. An added bonus to appointment more women is that, on average, women work longer hours than men. *See* Wilkins, Fong & Dinovitzer, *supra* note 8; s*ee* *also* Scott Westfahl, *More Women Means More Success*, Harv. L. Today (Jun. 17, 2015), https://today.law.harvard.edu/from-the-women-lawyers-journal-more-women-means-more-success/. [↑](#footnote-ref-55)
56. *See* Jena McGregor, *More Women at the Top, Higher Returns*, Wash. Post (Sept. 24, 2014), https://www.washingtonpost.com/news/on-leadership/wp/2014/09/24/more-women-at-the-top-higher-returns/?utm\_term=.c4fe9d02ff68; *see also* Jacqueline Bell, *What Happens At Law Firms When Women Take Charge*, Law360 (Apr. 20, 2016, 9:28 PM), https://www.law360.com/articles/786736/what-happens-at-law-firms-when-women-take-charge; Solange Charas, *A Mathematical Argument for More Women in Leadership*, Fast Company (Sept. 30, 2014), https://www.fastcompany.com/3036365/a-mathematical-approach-to-appointing-more-women-to-your-board; Daniel Victor, *Women in Company Leadership Tied to Stronger Profits, Study Says*, N.Y. Times (Feb. 9, 2016), https://www.nytimes.com/2016/02/10/business/women-in-company-leadership-tied-to-stronger-profits.html. [↑](#footnote-ref-56)
57. *See* Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124 (2012). [↑](#footnote-ref-57)
58. *See* Eric Jaffe, *The New Subtle Sexism Toward Women in the Workplace*, Fast Company (Feb. 6, 2014) https://www.fastcompany.com/3031101/the-new-subtle-sexism-toward-women-in-the-workplace; *see also* Connie Lee, *Gender Bias in the Courtroom: Combatting Implicit Bias Against Women Trial Attorneys and Litigators*, 22 Cardozo J. of Law & Gender 229 (2016); Kathleen Nalty, *Strategies for* *Confronting Unconscious Bias*, 45 Colo. Law. 45 (2016); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 Colum. L. Rev. 458 (2001). [↑](#footnote-ref-58)
59. As of October 2016, the following organizations were considering the resolution: the National Bar Association, the American Board of Trial Advocates, and the American Bar Association, Judicial Division. *See* *NAWJ Monthly Update October 2016*, Nat’l Ass’n Women Judges (Oct. 3, 2016), https://www.nawj.org/blog/newsroom/post/nawj-monthly-update-october-2016#resolution. [↑](#footnote-ref-59)
60. After the Judicial Panel on Multidistrict Litigation (JPML) has transferred civil actions with common issues of fact to any district for coordinated or consolidated pretrial proceedings, it must remand any such action back to the original district court at or before the conclusion of those pretrial proceedings. 28 U.S.C. § 1407(a) (2012); *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998). In practice, however, most class cases settle before trial, and those cases that do not settle are more likely to proceed to trial in the transferee court through stipulation or consolidated complaint or because the original cases have been dismissed. [↑](#footnote-ref-60)
61. Manual for Complex Litigation § 22.1 (2004) (quoting Advisory Comm. on Civil Rules and Working Group on Mass Torts, Report on Mass Tort Litigation 10 (Feb. 15, 1999)). [↑](#footnote-ref-61)
62. *Id.* § 22.64 (footnote omitted). [↑](#footnote-ref-62)
63. Fed. R. Civ. P. 23(g)(1). [↑](#footnote-ref-63)
64. Fed. R. Civ. P. 23(g)(3). [↑](#footnote-ref-64)
65. Fed. R. Civ. P. 23(g)(1)(B). [↑](#footnote-ref-65)
66. Fed. R. Civ. P. 23(g)(4) (emphasis added). [↑](#footnote-ref-66)
67. Fed. R. Civ. P. 23(g)(2). [↑](#footnote-ref-67)
68. Manual (Fourth), *supra* note [34], § 10.2. [↑](#footnote-ref-68)
69. *Id.* § 10.21. [↑](#footnote-ref-69)
70. *Id.* [↑](#footnote-ref-70)
71. *Id.* [↑](#footnote-ref-71)
72. *Id.* [↑](#footnote-ref-72)
73. *Id.* § 10.224 (emphasis added). [↑](#footnote-ref-73)
74. *Id.* § 21.27 at 278. [↑](#footnote-ref-74)
75. *Id.*  [↑](#footnote-ref-75)
76. *Id.*  [↑](#footnote-ref-76)
77. Duke Law Ctr. for Judicial Studies, Standards and Best Practices for Large and Mass-Tort MDLs (Dec. 19, 2014), https://judicialstudies.duke.edu/sites/default/files/centers/judicialstudies/standards\_and\_best\_practices\_for\_large\_and\_mass-tort\_mdls.pdf [hereinafter MDL Standards and Best Practices]. [↑](#footnote-ref-77)
78. *See* *id.* at 34 (“MDL Standard 2: In an MDL action with many parties with separate counsel, the transferee judge should establish a leadership structure for the plaintiffs, and sometimes for the defendants, to promote the effective management of the litigation.”); *id.* at 42 (“MDL Standard 3: The transferee judge should select lead counsel, liaison counsel, and committee members as soon as practicable after the JPML transfers the litigation.”); *id.* at 53 (“MDL Standard 4: As a general rule, the transferee judge should ensure that the lawyers appointed to the leadership team are effective managers in addition to being conscientious advocates.”). [↑](#footnote-ref-78)
79. *Id*. at 46. [↑](#footnote-ref-79)
80. *Id*. at 58. [↑](#footnote-ref-80)
81. The *Standards and Best Practices* focus on MDLs (only some of which are class actions) and, in particular, on “large and mass-tort MDLs.” *Id*. at iv–v, 34. Some practices appropriate for large mass-tort MDLs, such as, for example, large leadership structures with multiple levels and numerous committees, are often not suitable for certain kinds of class actions. In *Vioxx Products Liability Litigation*, for example, there were ten plaintiff lawyer committees. Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. Rev. 71, 87 & n.70 (2015) [hereinafter Burch, *Judging Multidistrict Litigation*]. In most class actions, by contrast, it may be preferable to appoint one or a small number of lead counsel. *See* MDL Standards and Best Practices, *supra* note 77,at 35 (“Sometimes a fairly simple structure, consisting of a lead counsel and a liaison counsel, is all that is required. Consumer, securities fraud, and employment class actions in which the plaintiffs generally assert the same or similar claims often fall into this category.”). In federal antitrust class actions, for example, courts typically appoint much smaller leadership structures, usually appointing one to three firms as lead or co-lead counsel, and sometimes additionally appoint a plaintiffs’ executive or steering committee. [↑](#footnote-ref-81)